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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 JERRY SMITH,) No. C 14-02897 EJD (PR)
12 Plaintiff,)
13 v.) ORDER OF DISMISSAL WITH LEAVE
14) TO AMEND
15 DENISE REYES, et. al.,)
16 Defendants.)
_____)

17
18 Plaintiff, a state prisoner at San Quentin State Prison, filed the instant civil rights
19 action in pro se pursuant to 42 U.S.C. § 1983. Plaintiff's motion for leave to proceed in
20 forma pauperis will be granted in a separate written order.
21

22 **DISCUSSION**

23 **A. Standard of Review**

24 A federal court must conduct a preliminary screening in any case in which a
25 prisoner seeks redress from a governmental entity or officer or employee of a
26 governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify
27 any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a
28 claim upon which relief may be granted or seek monetary relief from a defendant who is

1 immune from such relief. See id. § 1915A(b)(1),(2). Pro se pleadings must, however, be
 2 liberally construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
 3 1988).

4 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
 5 elements: (1) that a right secured by the Constitution or laws of the United States was
 6 violated, and (2) that the alleged violation was committed by a person acting under the
 7 color of state law. See West v. Atkins, 487 U.S. 42, 48 (1988).

8 **B. Plaintiff's Claims**

9 Plaintiff claims that during December 2013, Defendants Dr. Reyes, Nurse
 10 Delacruz, and Dr. E. Tootell “neglected” his medical needs with respect to a pain his toe
 11 and inability to sleep at night. (Compl. at 3.) This claim must be dismissed because a
 12 claim of medical malpractice or negligence is simply not sufficient to state a violation of
 13 the Eighth Amendment. See Toguchi v. Chung, 391 F.3d 1051, 1060-61 (9th Cir. 2004);
 14 Hallett v. Morgan, 296 F.3d 732, 744 (9th Cir. 2002); Franklin v. Oregon, 662 F.2d
 15 1337, 1344 (9th Cir. 1981); see, e.g., McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir.
 16 1992), overruled on other grounds, (mere negligence in diagnosing or treating a medical
 17 condition, without more, does not violate a prisoner’s 8th Amendment rights); Anthony v.
 18 Dowdle, 853 F.2d 741, 743 (9th Cir. 1988) (no more than negligence stated where prison
 19 warden and work supervisor failed to provide prompt and sufficient medical care). The
 20 complaint shall be dismissed with leave to amend for Plaintiff to attempt to state an
 21 Eighth Amendment claim as described below.

22 Deliberate indifference to serious medical needs violates the Eighth Amendment’s
 23 proscription against cruel and unusual punishment. See Estelle v. Gamble, 429 U.S. 97,
 24 104 (1976); McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other
 25 grounds, WMX Technologies, Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (en
 26 banc); Jones v. Johnson, 781 F.2d 769, 771 (9th Cir. 1986). A determination of
 27 “deliberate indifference” involves an examination of two elements: the seriousness of the
 28 prisoner’s medical need and the nature of the defendant’s response to that need. See

1 McGuckin, 974 F.2d at 1059. A “serious” medical need exists if the failure to treat a
 2 prisoner’s condition could result in further significant injury or the “unnecessary and
 3 wanton infliction of pain.” Id. (citing Estelle, 429 U.S. at 104). A prison official is
 4 deliberately indifferent if he knows that a prisoner faces a substantial risk of serious harm
 5 and disregards that risk by failing to take reasonable steps to abate it. Farmer v. Brennan,
 6 511 U.S. 825, 837 (1994). The prison official must not only “be aware of facts from
 7 which the inference could be drawn that a substantial risk of serious harm exists,” but he
 8 “must also draw the inference.” Id. In order for deliberate indifference to be established,
 9 therefore, there must be a purposeful act or failure to act on the part of the defendant and
 10 resulting harm. See McGuckin, 974 F.2d at 1060; Shapley v. Nevada Bd. of State Prison
 11 Comm’rs, 766 F.2d 404, 407 (9th Cir. 1985).

12 13 CONCLUSION

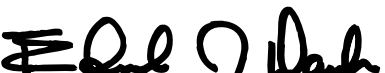
14 For the foregoing reasons, the Court orders as follows:

15 1. The complaint is DISMISSED with leave to amend. Within **twenty-eight (28)**
 16 **days** of the date this order is filed, Plaintiff shall file an amended complaint using the
 17 court’s form complaint. The amended complaint must include the caption and civil case
 18 number used in this order and the words “AMENDED COMPLAINT” on the first page
 19 and write in the case number for this action, Case No. C 14-02897 EJD (PR). Plaintiff
 20 must answer all the questions on the form in order for the action to proceed.

21 **Failure to respond in accordance with this order by filing an amended**
 22 **complaint will result in the dismissal of this action without prejudice and without**
 23 **further notice to Plaintiff.**

24 The Clerk shall include two copies of the court’s complaint with a copy of this
 25 order to Plaintiff.

26
27 DATED: 8/5/2014


 EDWARD J. DAVILA
 United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

JERRY SMITH,

Plaintiff,

v.

DENISE REYES, et al.,

Defendants.

Case Number: CV14-02897 EJD

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 8/5/2014, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Jerry Smith H44485
San Quentin State Prison
San Quentin, CA 94974

Dated: 8/5/2014

Richard W. Wieking, Clerk
/s/ By: Elizabeth Garcia, Deputy Clerk